Perwira Affin Bank Bhd (dahulunya dikenali sebagai Perwira Habib Bank Malaysia Bhd) v Lorrain Esme Osman

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D5-22-680-94
KAMALANATHAN RATNAM JC
31 JANUARY 1996

Civil Procedure *— Affidavits — Need to reply specifically to allegations — Failure to contradict acknowledgment of AR card — Whether amounts to admission of fact*

Evidence *— Burden of proof — Person who alleges fact must prove it — Defendant asserted that he was not within jurisdiction — Defendant to prove that he entered London from Hong Kong*

Evidence *— Documentary evidence — Newspaper report — Whether sufficient to conclusively establish a fact in dispute*

This was an appeal by the defendant against the senior assistant registrar's dismissal of his application to set aside the substituted service of the writ of summons and for a consequential order that the judgment in default of appearance obtained against him be set aside. The defendant contended that the alleged service of the writ on him on 23 July 1994 was bad as he had never been within the jurisdiction at the time of service. The defendant relied on a newspaper report and his passport to support his contentions that he had returned to the United Kingdom immediately after his release from prison in Hong Kong in August 1993 and that he had never been in Malaysia since 1984. The plaintiff contended that the newspaper report did not show that the defendant did not return to Malaysia after his release from prison and that the defendant's passport did not show the defendant's alleged entry into London from Hong Kong. Further, the AR card accompanying the writ of summons was returned to the plaintiff duly acknowledged and this was not disputed by the defendant.

Held, dismissing the appeal:

(1) Newspaper reports are by themselves insufficient to conclusively establish a fact in dispute without any other supporting documents or sources (see p 662I; *Karpal Singh v Sultan of Selangor* [1988] 1 MLJ 64 followed).

(2) It is trite law that he who asserts, proves. The defendant had not sufficiently explained why his passport did not contain an entry into the United Kingdom from Hong Kong and he had therefore failed to prove his assertion of the same (see p 663E; *Kay Hian & Co (Pte) v Jon Phua Ooi Yong & Ors* [1989] 1 MLJ 284 followed).

(3) In the evaluation of affidavit evidence, where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict it is usually treated as an admission by him of the fact so asserted (see p 663G; *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281 followed).

Per curiam:

Counsel and their clerks should not become witnesses in cases where they are retained and this applies equally to counsel making affidavits where the facts are in dispute (see p 662G; *The Evpo Agsa* [1992] 2 SLR 487 followed).

[Bahasa Malaysia summary

Ini adalah rayuan defendan terhadap penolakan oleh penolong kanan pendaftar akan permohonannya untuk mengetepikan penyampaian ganti writ saman dan untuk perintah berbangkit bahawa penghakiman ingkar yang diperolehi terhadapnya diketepikan. Defendan telah menegaskan bahawa penyampaian writ ke atasnya yang dikatakan pada 23 Julai 1994 adalah tidak sah kerana beliau telah tidak berada di dalam bidang kuasa pada waktu penyampaian. Defendan telah bergantung kepada laporan akhbar dan paspotnya untuk menyokong penegasan beliau bahawa beliau telah pulang ke United Kingdom serta-merta selepas pembebasannya dari penjara di Hong Kong dalam bulan Ogos 1993 dan bahawa beliau telah tidak berada di Malaysia sejak 1984. Plaintif menegaskan bahawa laporan akhbar itu tidak menunjukkan bahawa defendan telah tidak pulang ke Malaysia selepas pembebasannya dari penjara dan bahawa paspot defendan tidak menunjukkan kemasukan defendan yang dikatakan ke London dari Hong Kong. Selanjutnya, kad AR yang mengiringi writ saman telah dipulangkan kepada plaintif dengan diakui sewajarnya dan ini telah tidak dipertikaikan oleh defendan.

Diputuskan, menolak rayuan defendan:

(1) Laporan akhbar adalah secara sendirinya tidak mencukupi untuk mendirikan secara kukuh suatu fakta yang dipertikaikan tanpa apa-apa dokumen atau sumber sokongan yang lain (lihat ms 662I; *Karpal Singh v Sultan of Selangor* [1988] 1 MLJ 64 diikut).

(2) Adalah undang-undang yang biasa bahawa dia yang menegaskan, membuktikan. Defendan telah tidak menjelaskan dengan secukupnya mengapa paspotnya tidak mengandungi kemasukan ke dalam United Kingdom dari Hong Kong dan beliau telah dengan itu gagal untuk membuktikan penegasannya mengenai yang sama (lihat ms 663E; *Kay Hian & Co (Pte) v Jon Phua Ooi Yong & Ors* [1989] 1 MLJ 284 diikut).

(3) Dalam penilaian keterangan afidavit, di mana suatu pihak membuat penegasan positif atas isu yang material, kegagalan lawannya untuk menyangkal adalah biasanya dianggap sebagai

suatu pengakuan olehnya akan fakta yang ditegaskan itu (lihat ms 663G; *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281 diikut). A

Per curiam:

Peguam-peguam serta kerani-kerani mereka tidak patut menjadi saksi di dalam kes di mana mereka dibayar retainer untuk dan ini terpakai secara yang sama kepada peguam yang membuat afidavit di mana fakta-fakta adalah dipertikaikan (lihat ms 662G; *The Evpo Agsa* [1992] 2 SLR 487 diikut).] B

[*Editorial note*: The defendant has appealed to the Court of Appeal vide Civil Appeal No W–02–79–96.] C

Notes

For cases on the need to reply specifically to allegations in an affidavit, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 200–202. D

For a case on the burden of proof of a person who alleges a fact, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) para 325.

Cases referred to

Development & Commercial Bank Bhd v Aspatra Corp Sdn Bhd & Anor and another appeal [1995] 3 MLJ 472 E

Evpo Agsa, The [1992] 2 SLR 487

Fry v Moore (1889) 23 QBD 395

Hadkinson v Hadkinson [1952] 2 All ER 567

Karpal Singh v Sultan of Selangor [1988] 1 MLJ 64

Kay Hian & Co (Pte) v Jon Phua Ooi Yong & Ors [1989] 1 MLJ 284 F

Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281

Pembinaan KSY Sdn Bhd v Lian Seng Properties Sdn Bhd [1991] 1 MLJ 100

Puah Bee Hong & Anor v Pentadbir Tanah Daerah Wilayah Persekutuan Kuala Lumpur & Anor (Teo Keng Tuan Robert, intervener) and another appeal [1994] 2 MLJ 601 G

Renu Zachariah (*Anad & Noraini*) for the appellant/defendant.

Neoh Poh Cheng (*Suhaimi Khor Zulkifli & Chang*) for the respondent/plaintiff.

H

Cur Adv Vult

Kamalanathan Ratnam JC: This was an appeal by the defendant against the learned senior assistant registrar's dismissal on 15 December 1995 of his application (encl 7) to set aside the substituted service of the writ and for a consequential order that the judgment in default of appearance obtained against him on 11 August 1994 be set aside. I

In support of encl 7, one Anad Krishnan, an advocate and solicitor of the High Court of Malaya, affirmed an affidavit on 3 April 1995 stating

A that he had conduct of this matter and had been given the authority to affirm the said affidavit on behalf of his client, the defendant. The material part of his affidavit is reproduced as follows:

> 3 Save where the contrary appears, the facts and matters to which I depose herein are within my own knowledge and are true. Where I
B depose herein to facts and matters not within my own knowledge, the source of my information concerning such facts and matters sufficiently appears and I verily believe such facts and matters to be true.
>
> 4 I crave leave to refer to the judgment in default dated 11 August 1994 and to the affidavit of service of Mr Rameswaran a/l S Maheswaran filed herein to prove service of the writ of summons on the defendant.
>
C 5 I am instructed by the defendant to state that the grounds for setting aside service of the writ of summons are as follows:
>
> (i) I wish to state that the defendant left Malaysia in 1984.
>
> (ii) He was arrested and incarcerated in December 1985 in Pentonville and Brixton Prisons, London until 1992.
>
D (iii) In December 1992, the defendant was extradited to Hong Kong and was in Stanley Prison until August 1993, when he was released.
>
> (iv) When the defendant was released, he returned to London. He has never returned to Malaysia since he left in 1984. I annex a copy of the newspaper report which appeared in the London 'Sunday Standard' on 22 August 1993 which is self-explanatory and marked
E 'A'.

In reply to Anad Krishnan's affidavit, the assistant general manager of the plaintiff affirmed an affidavit on 14 April 1995 and averred that the newspaper report which stated that the defendant was released in August 1993 did not show that the defendant did not return to Malaysia after that.

F In response, the defendant himself affirmed an affidavit in London on 27 October 1995 before a notary public. He averred that he left Malaysia in 1984 and never returned since then and that therefore he could not have been served the writ of summons by registered post on 23 July 1994 as alleged by the plaintiff's process server in his affidavit of
G service affirmed on 10 August 1994. The defendant averred that he only came to know of the plaintiff's claim when his solicitors saw the advertisement of the bankruptcy notice in the newspapers on 27 February 1994, whereupon his solicitors wrote to the plaintiff's solicitors on 22 March 1995 as to whether they were agreeable to setting aside the judgment. Upon the plaintiff refusing to consent, the defendant filed this application
H to set aside the said judgment.

The defendant further averred that he was arrested and incarcerated in 1985 at Pentonville Prison, United Kingdom and was subsequently transferred from Pentonville Prison to Brixton Prison, also in the United Kingdom, where he remained up to the time he was extradited to Hong
I Kong in December 1992. He remained in Stanley Prison, Hong Kong, from December 1992 until his release in August 1993, when he returned to London. In support of his averments, the defendant annexed photostat copies of all pages of his passport, as an exhibit. He therefore contended that the writ of summons had not been served on him at any time as service

was bad since he had never been within the jurisdiction at the time of service.

In reply to the defendant's affidavit one Neoh Poh Cheng, an advocate and solicitor of the firm representing the plaintiff, affirmed an affidavit. It was her contention that the service was proper as was deposed by M Rameswaran a/l S Maheswaran, the process server. With reference to the passport which showed that the defendant had indeed not entered Malaysia, she averred that neither did the passport show the defendant's entry into London from Hong Kong, as contended by the defendant. Although this last affidavit was affirmed on 7 November 1995 there was no rebuttal affidavit from either the defendant or his counsel.

The affidavit of the process server, an employee of the plaintiff's solicitors, showed that on 23 July 1994 at 10.30am he went to the post office at Sentul, Kuala Lumpur, and posted an AR registered letter, addressed to the defendant at No 26, Jalan Kia Peng, 50450 Kuala Lumpur. He then exhibited a copy of the writ, the accompanying letter dated 18 July 1994 from his firm, acknowledgment for posting by the post office and the AR card duly signed and acknowledged.

In her submission, Miss Renu Zachariah, counsel for the defendant, referred to the case of *Development & Commercial Bank Bhd v Aspatra Corp Sdn Bhd & Anor and another appeal* [1995] 3 MLJ 472 wherein there was also a challenge to the service of the summons. The second defendant therein (who is the defendant in the present suit) stated in his application that at the time the substituted service was effected, he was in prison and that he could not therefore have been evading service. The learned trial judge set aside the default judgment stating that the order for substituted service was bad. But the application by the appellant was to set aside the judgment in default and not the substituted service. Dato' Peh Swee Chin FCJ in delivering the decision of the Federal Court at pp 477, 478, held as follows:

> For our part, with great respect we were unable to agree with the learned judge for deciding in this manner by brushing aside the order of substituted service, for the learned judge was obviously considering the validity of the order of substituted service of the High Court dated 5 January 1986 when the same order was not a subject matter of an application before the learned judge or for that matter, before the learned registrar earlier for its discharge. The order of substituted service of the High Court, a superior court of competent jurisdiction, must be obeyed by everyone save in a few and rare exceptions and it can only be challenged as regards its validity by the only way of having it set aside, by proceedings instituted for the very purpose. It cannot be challenged thus collaterally in any proceedings as regards its validity save in a very few rare exceptions, (such as a bankruptcy court going behind a judgment of any court on credibly raised issues of collusion, fraud, etc, only on hearing a bankruptcy petition), which all do not apply here. Please see *Pembinaan KSY Sdn Bhd v Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 100; *Puah Bee Hong & Anor v Pentadbir Tanah Daerah Wilayah Persekutuan Kuala Lumpur & Anor (Teo Keng Tuan Robert, intervener) and another appeal* [1994] 2 MLJ 601 and *Hadkinson v Hadkinson* [1952] 2 All ER 567. In this connection, it is immaterial that the said order of the High

A Court was actually made by the learned registrar and not a High Court judge. The learned registrar should be considered notionally to be making the order as if he were a deputy High Court judge.

The Federal Court in considering another appeal involving the same parties gave its reasons at p 478 as set out below:

B This [appeal] arose out of a proceeding to challenge directly and not collaterally, the validity of the service pursuant to the order of substituted service, by asking for the service of the writ on the second defendant to be set aside; and by the inevitable and necessary implication, for such order of substituted service to be itself set aside.

C The second defendant had on 25 May 1992, entered a conditional appearance for the purpose of setting aside the writ of summons.

On 29 May 1992, after such conditional appearance, the second defendant filed an application to set aside such service on the ground it was wrong in law. The learned registrar heard the application, granted it in terms as prayed. On appeal to the judge in chambers, the appeal was dismissed. The D ground of the learned judge was that such an order of substituted service was bad in law and the consequent service in pursuance thereof was also bad in law.

The learned judge took it apparently for granted that the writ of summons itself was not bad, and we would agree with it, for even though the second defendant was out of jurisdiction at the time of the issue of the writ, 'the E plaintiff might have kept it with the view of serving it on the defendant if he should come within the jurisdiction', per Lindley LJ in *Fry v Moore* (1889) 23 QBD 395. In this connection, it is interesting to observe that by entering a conditional appearance, in any event, the second defendant would then have been deemed to have submitted to the jurisdiction of the court—subject to the right to apply to set aside the writ or service of the writ.

F The appellant's counsel rested her case before me with this authority and with no further submission.

Miss Neoh for the respondent countered by distinguishing the facts in the *D & C Bank* case with the present case in that it was not in dispute in the *D & C Bank* case that at that material time the second defendant G was in prison in London. The present case related to a period when he had already been released from prison. She relied on the affidavit of her process server and the AR card that was acknowledged.

To a question put by the court, both counsel confirmed that the defendant was released from prison in 1993. Miss Neoh argued that H although the appellant had averred that upon his release from Hong Kong, he had gone straight to London, yet the appellant's passport that was exhibited showed no entry into London, England. She contended that he who asserts ought to prove and since the appellant had alleged that he was in London he ought to prove that fact.

I In reply, Miss Renu Zachariah confirmed that her client's passport did not show any entry into London, England. However, she submitted that Anad Krishnan's affidavit wherein he deposed to having personal knowledge of matters relating to his client was sufficient. As to the non-disclosure in his passport of his entry into London she contended that that

was not the issue in the present case which related to his presence in Malaysia.

Anad Krishnan's affidavit

Anad Krishnan was counsel having conduct of this matter for the appellant. He averred that where he deposed to facts and matters not within his own knowledge the source of his information concerning such facts and matters sufficiently appeared in the said affidavit and he verily believed such facts and matters to be true.

He has relied on a newspaper report, exh A, as being his source of information and belief.

In *Karpal Singh v Sultan of Selangor* [1988] 1 MLJ 64, Abdul Hamid CJ (as his Lordship then was) had this to say with regard to newspaper reports at pp 65, 66:

> ... the sole foundation of the originating summons is the statement allegedly made by the Sultan as reported in the *New Straits Times* and *The Star* newspapers on 27 July 1987. There is no affidavit before the court affirmed to by the reporter concerned stating that he heard the Sultan make such statement. The press reports of what the Sultan is reported to have said would appear to be inadmissible as hearsay. The fact that the Sultan has not contradicted the press reports does not, in my view, make the slightest difference for it is well-established that inadmissible evidence does not become admissible by reason of a failure to object. ...
>
> Without the press reports, what other evidence is there to show what the Sultan said on the occasion concerned? In my view, therefore, the originating summons founded upon such premises may be held to be groundless.

The newspaper report is therefore not a proper source for Anad Krishnan's information and belief compared with the defendant's own passport. Since the matter deposed to can lead to a conflict of evidence, counsel ought to note the salutary warning given by GP Selvam JC in *The Evpo Agsa* [1992] 2 SLR 487 wherein the learned judge said that counsel and their clerks should not become witnesses in cases where they are retained and this applied equally to counsel making affidavits where the facts were in dispute.

An advocate and solicitor should be a percussionist of his client's case; not a protagonist in its cause. If he descends into the arena of the trial by affirming an affidavit relating to disputed facts, he could be subjected to the usual process of cross-examination. How far then can he extend the right of privilege? Issues such as these ought to be in the forefront of the mind of a solicitor before he rushes in to affirm an affidavit upon his client's cause.

In any event since I am of the view that newspaper reports by themselves are insufficient to conclusively establish a fact in dispute without any other supporting documents or sources, and since Anad Krishnan had unequivocally stated that the truth of matters stated in his affidavit was based on the newspaper report, I hold that his affidavit does not support the appellant's case that he was not in this country at the material time.

The appellant's affidavit

The appellant had himself affirmed an affidavit stating that he was never in this country at the material time. In support of this positive assertion he exhibited copies of all pages of both his Malaysian passports issued on 3 October 1984 valid till 3 October 1989 and another passport issued on 20 July 1993 and valid till 20 July 1998, both bound together and used as one travel document. He maintained that upon his release from the prison in Hong Kong in August 1993, he returned to London. Surely if he had returned to London, his passport would clearly show the stamp of the immigration department of the United Kingdom on his passport signifying his right of ingress into the United Kingdom from Hong Kong. But the passport significantly failed to disclose this. Yet the appellant's affidavit was indeed affirmed before a notary public in London. I cannot ascribe to the appellant the attributes of a modern-day Houdini in the absence of positive evidence to that effect. It is also noted from his passport that the defendant had, on 26 June 1986, at a time when he was allegedly incarcerated in British prisons, been granted a Certificate of Entitlement to the Right of Abode in the United Kingdom by the Home Office. I am therefore constrained to ask myself how the appellant was able to enter the United Kingdom without his Malaysian passport being endorsed. It is trite law that he who asserts, proves. (See *Kay Hian & Co (Pte) v Jon Phua Ooi Yong & Ors* [1989] 1 MLJ 284.)

I am satisfied that the passports exhibited do not disclose any entry into Malaysia at about or prior to the material time. But I am further constrained to ask myself if it was not possible for the appellant to have been in Malaysia at the time the writ was posted to him because he was unable to show how he was able to enter into the United Kingdom without an endorsement from the immigration department.

Further the AR card was acknowledged, signed and returned to the plaintiff. There was no evidence explaining this fact; nor was there any denial that the person receiving the letter had no authority so to do or that it was indeed not delivered. I call to mind the positive assertion of law on this aspect as enunciated by Gopal Sri Ram JCA in *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281 at p 286:

> Now it is a well-settled principle governing the evaluation of affidavit evidence that where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict it is usually treated as an admission by him of the fact so asserted.

In the circumstances, on the facts and on the law, I had no other alternative but to dismiss this appeal with costs.

Appeal dismissed.

Reported by RP Shah